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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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Applications for Consent )  
To the Transfer of Control of Licenses and )  
Section 214 Authorizations from )  
 )  
TELE-COMMUNICATIONS, INC., )  
Transferor, )  
 )  
to )  
 )  
AT&T CORP., )  
Transferee. )

CS Docket No. 98-178

To: The Commission

REPLY COMMENTS OF THE  
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these reply comments on the applications requesting approval of the acquisition by AT&T Corp. ("AT&T") of Tele-Communications, Inc. ("TCI").<sup>1</sup> CompTel is a national industry association representing competitive telecommunications carriers and their suppliers. With over 250 members, including large nationwide suppliers and scores of smaller regional carriers, many of which will be competitors of AT&T/TCI and all of which will be affected by the merger's impact on the telecommunications marketplace, CompTel has a direct interest in this proceeding.

<sup>1</sup> Applications for Transfer of Control, *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp. Transferee*, CS Docket No. 98-178 (filed Sept. 14, 1998), Description of Transaction, Public Interest Showing, and Related Demonstrations ("Public Interest Statement").

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CompTel does not oppose the proposed merger to the extent that it will promote competition in the local exchange and exchange access markets, as the Applicants promise. However, CompTel believes that in order to ensure that the merger will in fact enhance competition and consumer choice, and in order to promote and safeguard competition in *all* voice, video, and data markets, the public interest mandates that the Commission condition its approval of the merger on a requirement that the merged entity provide to all competing service providers open and equal access to its broadband cable network.

**I. THE APPLICANTS MUST DEMONSTRATE THAT THE MERGER SERVES THE PUBLIC INTEREST.**

Sections 214(a) and 310(d) of the Communications Act require that AT&T and TCI demonstrate to the Commission that transfer of control of TCI's licenses and authorizations to AT&T serves "the public interest, convenience, and necessity."<sup>2</sup> The Commission recently and repeatedly has emphasized that the public interest standard is both flexible and broad, generally encompassing the procompetitive and deregulatory goals of the 1996 Act. Specifically, among other issues, the Commission must consider whether a proposed transaction will "open[] all telecommunications markets to competition"<sup>3</sup> and "enhance[] access to advanced telecommunications and information services. . . in all regions of the Nation,"<sup>4</sup> and also "whether

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<sup>2</sup> 47 U.S.C. §§ 214(a), 310(b); *In the Matter of the Merger of MCI Telecommunications Corp. and British Telecommunications PLC*, 12 FCC Rcd 15351, ¶¶ 29 (1997); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, ¶¶ 29, 32. (1997).

<sup>3</sup> *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, FCC 98-225, CC Docket No. 97-211, ¶ 9 (1998) ("WorldCom/MCI Order").

<sup>4</sup> *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer Control*, 13 FCC Rcd 15236, ¶ 11 (1998).

the merger will affect the quality of telecommunications services provided to consumers or will result in the provision of new or additional services to consumers.”<sup>5</sup>

Finally, it is well established that, in order to ensure that a merger will in fact serve the public interest, the Commission has the authority under Sections 214(c) and 303(r) of the Act to attach appropriate conditions to its approval of a transaction.<sup>6</sup> As discussed below, the Commission must exercise its authority to condition approval of this proposed merger on a requirements that AT&T/TCI provide all competing providers of telecommunications and information services with open and equal access to its broadband network.

## **II. THE PUBLIC INTEREST REQUIRES THAT THE COMMISSION APPROVE THE MERGER ONLY ON THE CONDITION THAT AT&T/TCI PROVIDES COMPETITORS WITH OPEN AND EQUAL ACCESS TO ITS BROADBAND CABLE NETWORK.**

### **A. After The Merger AT&T/TCI Will Control Bottleneck Local Broadband Cable Facilities.**

The proposed merger of AT&T and TCI would combine AT&T’s current consumer long distance, wireless, and Internet service units with TCI’s cable, telecommunications, and high-speed Internet business, thereby resulting in the creation of a massive, uniquely situated, and vertically integrated competitor with the capability to provide a full and highly advanced range of local and long distance voice, video, and data services. AT&T’s self-proclaimed principal purpose for the merger is the acquisition of TCI’s cable infrastructure, which will enable AT&T to build a nationwide facilities-based local residential telecommunications network.<sup>7</sup>

Specifically, AT&T plans to invest in significant upgrades to TCI’s cable system so that it will

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<sup>5</sup> *WorldCom/MCI Order*, ¶ 9.

<sup>6</sup> *Id.*, ¶ 10.

<sup>7</sup> Public Interest Statement at 13-14.

be capable of providing digital telephony and data services to the millions of residences now served by TCI, and, ultimately, throughout the rest of the country.<sup>8</sup>

AT&T/TCI thus will be uniquely positioned as an alternative provider of local exchange and exchange access services, thereby providing consumers with at least one facilities-based alternative to ILEC voice loops. Indeed, AT&T/TCI's broadband local loop will, at least in the foreseeable future, be the *only* pervasively-available alternative to the ILECs' bottleneck local facilities for many subscribers. As the Applicants note, "the FCC has found no evidence suggesting the existence of any significant actual competitors to the ILECs with respect to the provision of residential local telephone service in the geographic areas where AT&T is present."<sup>9</sup> Moreover, just as the ILECs wield monopoly control over their local loops, so too, in many cases, AT&T/TCI will control the only presently available means of delivering integrated broadband services to the base of customers in TCI's service areas.<sup>10</sup> Thus, although AT&T/TCI will provide consumers with an alternative method of access to upstream markets and suppliers, that alternative, like the ILEC local loop, will be a bottleneck.

To the extent that the acquisition of TCI will expand and accelerate AT&T's ability to compete with ILECs in providing local telephone services to residential customers, as the Applicants hope, CompTel believes the merger to be in the public interest. Moreover, it would appear that the combined AT&T/TCI not only will be positioned as a direct competitor of the ILECs for their residential local exchange and exchange access customers, but will have an

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 17

<sup>10</sup> While ILECs can make their local loops capable of delivering advanced services to subscribers, and they have made and continue to make sizable infrastructure investments in advanced services capabilities, it will be quite some time before they will be able to replicate the ubiquitous broadband coverage of the AT&T/TCI network.

advantage over the ILECs in that AT&T/TCI will be able to provide those customers with services the ILECs currently are prohibited from offering -- such as, for example, basic interexchange service. Clearly, this ability to provide consumers with either “one-stop shopping,” in addition to any other packaged or “*a la carte*” service, should increase service and technology options available for consumers.

Conversely, however, AT&T/TCI’s control of the most extensive broadband local network platform in the nation, combined with its ability to provide a full range of integrated services, will not maximize competitive opportunities within the industry unless it is reasonably available to requesting carriers. Without the right to gain access to that platform, carriers will be severely limited in their ability to compete with AT&T/TCI in the provision of either packaged or individual voice, video, and data services. Certainly, despite the clear provisions of the Telecommunications Act of 1996 and the Commission’s efforts to implement those provisions, the ILECs do not now provide carriers with a cost-based means of providing one-stop-shopping services to consumers. Unless the Commission takes appropriate prophylactic steps, the AT&T/TCI alternative broadband cable network could be an equivalent bottleneck for “last mile” facilities.<sup>11</sup>

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<sup>11</sup> Given the unique ubiquitous alternative broadband network that the merged AT&T/TCI entity would have, any Commission determination that such a network effectively constitutes a bottleneck local access facility would not require the Commission to make any determination whether other alternative local access facilities by competitive local exchange carriers also constitute bottleneck facilities.

**B. The Commission Should Condition Approval Of The Merger On A Requirement That AT&T/TCI Provide All Competitors With Open And Equal Access To Its Broadband Local Network.**

As noted above, essential to the Commission's public interest analysis of this merger is an examination of whether the transaction will enhance access to advanced telecommunications and information services, and result in the provision of new or additional services to consumers. In this regard, the Applicants have pledged that the merger "will increase the availability to consumers of a wide array of packaged and *a la carte* services."<sup>12</sup> However, CompTel doubts that this admirable goal truly can be achieved unless consumers served by AT&T/TCI's local broadband cable network have access to an equally wide array of service providers. To ensure that only the procompetitive possibilities of the AT&T/TCI merger are realized, the Commission must ensure that AT&T/TCI's local broadband network customers have the same range of choices regarding their preferred providers of long distance and Internet services as they have today as customers of incumbent LECs.

Accordingly, CompTel agrees with the many commenters who have suggested that the Commission impose an open and equal access condition on its approval of the merger.<sup>13</sup> Specifically, CompTel submits that, as soon as AT&T/TCI begins to offer any telecommunications or information services over its broadband network, the Commission require AT&T/TCI to provide all competitive providers of telecommunications and information services with reasonable and nondiscriminatory access, at reasonable points of interconnection and in accordance with reasonable and nondiscriminatory network standards, to the cable and other

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<sup>12</sup> Public Interest Statement at 14.

<sup>13</sup> See, e.g., America Online, Inc. Comments at 1-3; EchoStar Communications Corporation Comments at 2-8; MCI WORLDCOM, Inc. Comments at 1-4; MindSpring Enterprises, Inc. Comments at 1-3; SBC Communications Inc. Comments at 11-15; Sprint Corporation Comments at 10-21.

local network facilities used by AT&T/TCI to provide those telecommunications and information services. In addition, the Commission should require AT&T/TCI to provide such access at cost-based rates to be established by mutual agreement between the parties -- subject to FCC oversight for interstate services.<sup>14</sup> CompTel believes that imposition on the merged entity of such an open and equal access requirement is the only way to ensure that the merger results in, as AT&T has pledged, a “level playing field, in terms of access,” to the broadband network.<sup>15</sup>

Further, the open and equal access requirement is both a reasonable and appropriate condition to impose on AT&T/TCI. The Commission consistently has recognized the importance of ensuring nondiscriminatory and open access to bottleneck facilities. Indeed, this requirement is comparable to the “equal access” obligation which Judge Greene imposed on the RBOCs after the AT&T divestiture, which is preserved in Section 251(g) of the 1996 Act.<sup>16</sup> The Commission has imposed similar equal access requirements on all other ILECs pursuant to Title II of the Communications Act of 1934.<sup>17</sup> The Commission’s years of experience in implementing such a requirement ensure that a similar requirement can feasibly and efficiently be imposed upon AT&T/TCI.

AT&T and TCI will attempt to argue to this Commission -- and AT&T already has done so by public response to the commenters -- that no company would make the necessary investment in an alternative local infrastructure if it were required to “share” that infrastructure

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<sup>14</sup> In this regard CompTel would note that the Commission recently found that a new service offered by GTE, which provides a dedicated, high-speed data connection to the Internet, is an interstate special access service and subject to Commission jurisdiction. *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, FCC 98-292, ¶ 1 (rel. Oct. 30, 1998).

<sup>15</sup> America Online, Inc. Comments at 3-4.

<sup>16</sup> 47 U.S.C. § 251(g).

<sup>17</sup> See, e.g., *Equal Access and Network Reconfiguration Costs*, Memorandum Opinion and Order, FCC 85-628 (rel. Dec. 9, 1985).

with competitors. CompTel submits that this argument is unconvincing. The fees AT&T/TCI collects from competitors for their use of its network, combined with the revenues generated by its own customers' use of the broadband network, should make its operations profitable. Moreover, as one commenter pointed out in this regard, AT&T recently stated that it looks forward to carrying other providers' offerings, because it wants as much traffic (and corresponding revenues) as possible in order to offset investment costs associated with the merger.<sup>18</sup>

In sum, an open and equal access requirement should serve both the public interest and the legitimately competitive purposes of AT&T/TCI. As discussed above and as the Applicants emphasize, after the merger AT&T/TCI will be able to offer the full range of vertically integrated services, both packaged and individualized, which consumers increasingly are requesting.<sup>19</sup> Requiring AT&T/TCI to provide reasonable and nondiscriminatory access to its broadband local network facilities to competitors will provide consumers with even more advanced service offerings, resulting in a more competitive environment for all telecommunications and information services.

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<sup>18</sup> EchoStar Communications Comments at 7.

<sup>19</sup> Public Interest Statement at 37-38.



## CONCLUSION

For the foregoing reasons, CompTel respectfully submits that the Commission condition approval of the proposed merger between AT&T/TCI on a requirement that, to the extent that it provides any telecommunications or information services over its broadband local network, the merged entity provide open and equal access to that network, on a nondiscriminatory basis and on reasonable terms and conditions, to all competitors.

Respectfully submitted,

### COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

Genevieve Morelli  
Executive Vice President  
and General Counsel  
COMPETITIVE TELECOMMUNICATIONS  
ASSOCIATION  
1900 M Street, N.W., Suite 800  
Washington, D.C. 20036

Robert J. Aamoth  
Rebekah J. Kinnett  
KELLEY DRYE & WARREN LLP  
1200 19th Street, N.W.  
Suite 500  
Washington, D.C. 20036  
(202) 955-9600

November 13, 1998

Its Attorneys

**CERTIFICATE OF SERVICE**

I, Rebekah J. Kinnett, hereby certify that on this 13th day of November, 1998 copies of the foregoing Reply Comments of the Competitive Telecommunications Association were served by first-class mail, postage prepaid, or by hand, on the following:

Royce Dickens  
Policy and Rules Division  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W., Room 406  
Washington DC 20554

Quyen Truong  
Policy and Program Planning Division  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 544  
Washington, DC 20554

Evette Keene  
Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 712  
Washington DC 20554

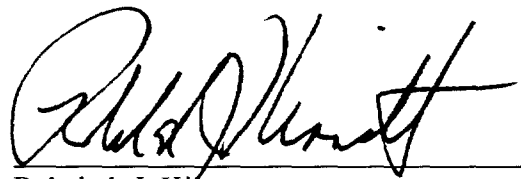
Karl Kensinger  
Satellite and Radio Communication Division  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 800  
Washington, DC 20554

Sherille Ismail  
Telecommunications Division  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 800  
Washington, DC 20554

Walter Strack  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 5002  
Washington, DC 20554

Deborah Lathen  
Chief, Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W.  
Washington, DC 20554

International Transcription Service, Inc.  
1231 20<sup>th</sup> Street, N.W.  
Washington, DC 20036

  
Rebekah J. Kinnett